

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**The County Commission of Fayette County,
West Virginia**, a political subdivision of the
State of West Virginia,

Case No. 2:21-cv-00307

Plaintiff;

**Ex. Rel. Anthony Ciliberti, Esq., Fayette County
Prosecuting Attorney,**

Relator;

v.

National Grid NE Holdings 2 LLC, a
Massachusetts Limited Liability Company,
et al.,

Defendants

**DECLARATION OF FRANCIS J. MURPHY IN SUPPORT OF NATIONAL GRID NE
HOLDINGS 2 LLC’S MOTION TO DISMISS CONTINENTAL INSURANCE
COMPANY’S SECOND CROSS-CLAIM**

I, Francis J. Murphy, declare as follows:

1. I am employed by National Grid USA Service Company, Inc. as Senior Counsel.

In that capacity, I am familiar with the claims alleged against National Grid NE Holdings 2 LLC (“National Grid 2”) by the plaintiff in this action, the County Commission of Fayette County, West Virginia (the “County”), as well as the Cross-Claims alleged in this action by Continental Casualty Company (“Continental”) against National Grid 2. I submit this Declaration in support of National Grid 2’s Motion to Dismiss Continental’s Second Cross-Claim. I have personal knowledge of the facts set forth in this Declaration.

2. National Grid 2 is the successor-in-interest to Eastern Gas and Fuel Associates (“Eastern Gas”), which for many years conducted mining operations in Fayette County.

The County’s Administrative Nuisance Actions

3. In October 2019, the County issued an “Information Demand” and “Notice of Endangerment and Conditional Notice of Intent to File a Federal Civil Action” to National Grid 2 and seven other respondents. The Notice of Endangerment alleged that the respondents had owned and operated mining facilities in Fayette County, and had disposed of hazardous substances that contaminated surface waters and groundwater within the Johnson Fork – Loop Creek Watershed of the Kanawha River. The County alleged that the respondents are liable under federal law for the investigation and cleanup of environmental damage to the Watershed, and it threatened to file a lawsuit against the respondents under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), if they did not act to abate the contamination. The Information Demand and Notice of Endangerment are attached hereto as **Exhibits 1 and 2**, respectively.

4. On May 10, 2021, Defendant Fayette County Code Enforcement Agency, on behalf of the County, initiated an administrative action against National Grid 2 and other respondents by issuing a “Time-Sensitive Abatement Action Order” No. 2021-002-9.5(b)-001. The Abatement Order alleges, in part, that Eastern Gas operated certain mines, including five surface impoundments (known as “gob piles”) containing coal mining waste, within the Johnson Fork – Loop Creek Watershed, and that the surface impoundments have released heavy metals and other hazardous substances into the Watershed and have contaminated soil, sediment, surface waters and groundwater within the Watershed. The County alleges that National Grid 2 and others are jointly and severally liable to pay for the costs of conducting (a) a Remedial

Investigation of the nature and extent of the environmental damage allegedly resulting from releases of hazardous substances from the five surface impoundments and associated mining operations within the Johnson Fork – Loop Creek Watershed, and (b) a Feasibility Study to evaluate alternatives for permanent remedial action to abate and clean up environmental contamination resulting from historical mining operations within the Watershed. The Abatement Order is attached hereto as **Exhibit 3**.

5. The County issued an amended “Time-Sensitive Abatement Action Order” on June 22, 2021. The amended Time-Sensitive Abatement Action Order” is attached hereto as **Exhibit 4**.

This Action and National Grid 2’s Attempts to Obtain Coverage

6. The County alleges in this action that National Grid 2 is liable under federal and state environmental statutes; Fayette County Ordinance # 2018-001, entitled “Fayette County Comprehensive Public Nuisance Abatement Ordinance”; and the common law of nuisance to investigate, clean up and abate a public nuisance, and to reimburse the County for abatement costs, allegedly attributable to environmental damage from historical mining operations in the Johnson Fork – Loop Creek Watershed. Specifically, the County alleges that National Grid 2’s “very extensive underground coal mining and related mining operations and mining waste disposal on the surface” in Fayette County contributed to a public nuisance—namely, “the Release of Toxic, noxious, harmful and hazardous contaminants into the subsurface soils, groundwater and surface waters of the Subject Watershed[.]” (ECF 31 ¶¶ 1, 2).

7. National Grid 2 has sought coverage for the Nuisance Actions from its predecessors’ legacy liability insurers, including Continental, under primary and excess liability policies in effect for various periods from 1961 to 1986. None of the insurers has acknowledged coverage for the claims asserted against National Grid 2 in the Nuisance Actions.

8. On May 21, 2021, National Grid 2 filed a civil action for damages and declaratory relief against the insurers in the Circuit Court of Fayette County, West Virginia. *National Grid NE Holdings 2 LLC v. County Commission of Fayette County, et al.*, Civil Action No. 21-C-62 (Cir. Ct. Fayette Cnty.) (the “Coverage Action”). The Coverage Action has been assigned to Judge Paul R. Blake. Counsel for National Grid 2 provided a courtesy copy of the Coverage Action complaint to Continental’s counsel on May 26, 2021, the date on which Continental was served through the West Virginia Secretary of State.

9. National Grid 2 filed an Amended Complaint in the Coverage Action on June 8, 2021. The Amended Complaint named, in addition to the County and other defendants, 32 insurer defendants including Continental. The Coverage Action Amended Complaint is attached hereto as **Exhibit 5**. Attached hereto as **Exhibit 6** is a chart comparing National Grid 2’s allegations in the Coverage Action Amended Complaint with Continental’s factual allegations in its Second Cross-Claim.

10. All defendants have been served with the Coverage Action Amended Complaint.

11. Continental has answered the County’s original Complaint in this action and filed two Cross-Claims against National Grid 2. (ECF 30). Continental is also a defendant in a separate enforcement action filed by the County in the Circuit Court of Fayette County. *County Commission of Fayette County, West Virginia v. The Continental Insurance Company*, Case No. 21-C-56. That action also is assigned to Judge Blake. Nevertheless, Continental has moved to dismiss the Coverage Action Amended Complaint on the ground, inter alia, that it is not subject to personal jurisdiction in West Virginia. The Complaint in the County action before Judge Blake is attached hereto as **Exhibit 7**.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 2nd day of August, 2021.

Francis J. Murphy
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